

# What Just Happened?

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Democratic presidential candidate Joe Biden almost surely won Tuesday's presidential election. Democrats tend to be located in cities and to vote in the pandemic by mail while Republicans can be found in more sparsely populated areas, voting in person. Because densely populated areas and mailed ballots are counted more slowly, the Republican votes were evident first in an early "red wave" and the strength of the Democratic vote has emerged only gradually day by day. The ballots that will be counted last are largely mailed-in ballots from heavily Democratic areas of battleground states, which is why almost all forecasters now believe Biden will be the next president. It isn't the elegant knockdown victory that polls led everyone to expect, but winning is still winning.

Biden has already won the clear majority of "the popular vote" (which would just be called "the vote" in almost any other democracy). Given record turnout, Biden has already received more actual votes than any president in history even before the last ballots have been counted. President Donald Trump's votes also exceed the number he received in 2016, though he has many million fewer votes than Biden nationwide. But of course, the US doesn't allocate the presidency by nationwide popular vote; the distribution of that vote across states is what produces the final result. National presidential elections are determined in a series of state-run elections conducted largely under state-law rules, which are then added up to form a national result. What we call the presidential election is actually 50 state elections that determine which electors will represent the state in the Electoral College. These electors in turn vote for the national president and vice president.

Trump is not a good loser and he is unlikely to give up without a fight. So, danger signals are flashing red. In the middle of election night, with millions and millions of Democratic ballots still uncounted and the bulk of the Republican votes already tallied, the incumbent president declared himself the winner. Trump is now claiming that the election is being stolen from him, a claim given surface plausibility as his early apparent victories have been gradually erased with Democratic blue on election maps. Trump's angry tweets demonstrate he will not necessarily accept the results. So there is still danger ahead.

Even before the election, Trump hired a battalion of lawyers who have marching orders to attempt to disqualify as many Democratic ballots as they can, to demand recounts in states where the vote is close, and to offer self-serving readings of the relevant (often indeed confusing) state law so that judges will throw the election to Trump. In his election night ramble, Trump signaled that he would indeed litigate anywhere and everywhere he could. He even asserted that the election would go to the US Supreme Court before it was all over.

Trump's lawyers have already started filing cases in nearly all late-breaking states, and some crucial election case might well wind up at the Supreme Court that

Trump so recently packed with conservative justices. Trump's confidence that the Supreme Court may save him in the end may come from the fact that the justices he picked weren't any old conservatives. Of the three justices Trump appointed to the Supreme Court, two (Brett Kavanaugh and Amy Coney Barrett) had worked for the Republican party on the *Bush v. Gore* litigation that resulted in the Supreme Court handing the 2000 election to George W. Bush. John Roberts, now chief justice of the Court, was also on that litigation team. Moreover, in almost every election law case since Ronald Reagan was president, the Supreme Court has sided with Republicans, almost no matter what they were arguing. In short, the Supreme Court is already hard-wired with conservative votes that may well decide any serious election challenge in Trump's favor.

In this 2020 election cycle, tension has already mounted over a concurrence in an election law case that Justice Kavanaugh penned last week, signaling that he is receptive to legal challenges that rely on what had previously been thought to be [a crackpot theory](#) that only state legislatures, and not their courts or governors, are allowed to set the rules for picking electors to the Electoral College. [Kavanaugh indicated that he wants the federal courts front and center](#) in election law challenges, against common wisdom that state courts should have the last word on matters of state law. In a pandemic year when both governors and state courts made many last-minute adjustments to the election rules to make it safer to vote, Trump's lawyers already brought more than 300 cases, which were decided in the weeks running up to the election. The legal questions raised by those cases have not all been definitively settled. Now the Trump lawyers have gone into overdrive, knowing that a potentially sympathetic Supreme Court waits for them at the end of the litigation road.

In the 24 hours since the polls closed, Trump has already filed legal challenges in Wisconsin (demanding a recount), Michigan (demanding that they admit Republican party operatives to observe the tabulation of mail-in ballots), Nevada (demanding that the state stop counting mail-in ballots), Arizona (demanding that the state count every ballot), Georgia (challenging the acceptance of mail-in ballots postmarked before election day but arriving afterwards) and Pennsylvania (urging the court to prevent late-arriving ballots from being counted PLUS challenging the fact that some counties notify voters when their ballots have been disqualified thus allowing the voter to fix the problem, while other counties do not). There will surely be more lawsuits to come.

Trump's litigation blitz has three goals. First, he wants to win any way he can. Second, he wants to create the appearance that the election was stolen from him by insisting that the election was not fair. But even if the litigation does neither of these things, its third effect may be the most important. Litigation slows down the certification of electors. With presidential elections, time matters.

By law, the Electoral College must meet this year on 14 December so that the electors can cast their votes for president. States must have their election results certified by the 8 December "safe harbor" date so that their electors are known before the Electoral College meets. Republican constitutional lawyers, now including Justice Kavanaugh, have been championing for years a theory that, if the results of

the popular election to pick electors are inconclusive, the state should be guided by the federal Constitution which says in Art. II(2) that “Each State shall appoint, in such a Manner as the Legislature thereof may direct, a Number of Electors . . .” As a result, according to this theory, if a state’s election results cannot be clearly known, the state legislature should then choose the electors themselves.

Before the Civil War in the mid-19<sup>th</sup> century, presidential electors were in fact usually chosen directly by state legislatures. Popular election to pick electors only became the norm after the Civil War. The Supreme Court, guided by originalism, confirmed that popular elections were not constitutionally required in its *Bush v. Gore* ruling in 2000, when it said that there was no individual right to vote for president enshrined in the US Constitution. State legislatures are given the power in the US Constitution to determine how their state’s electors are picked.

Election 2020 generates a perfect storm to test this theory because in key battleground states that will determine the presidency, the electorate seems to have chosen Biden while the state legislatures in those states would choose Trump. In the three most consequential swing states, Pennsylvania, Michigan and Wisconsin, the state legislature is Republican and the electorates have picked the Democratic candidate. If the election results can be tipped over through a blitz of litigation into the “too confused to certify” category, those Republican legislatures in all three states could cancel the popular election results and directly vote their electors for Trump. Game over.

There are good constitutional arguments that state legislatures are stuck with the results of a popular election once they have chosen this method selecting electors. While state legislators could constitutionally choose not to run presidential elections at all, they can’t change the rules in the middle of the game. That’s what I argued as one of the experts testifying before the Florida Legislature in 2000. Had the Supreme Court not called off the Florida recount, the Florida legislature would have almost surely then voted a slate of electors for Bush. I argued that this would have violated the Constitution by turning the Florida legislature into a kingmaker to whom the president would then owe his election, something that the Electoral College – by picking the president and then dissolving itself before the president takes office – neatly avoids. In 2000, the Supreme Court picked the president before the Florida legislature could substitute its own electors, so the constitutionality of this remains an unsettled question. But now we are facing a wall of Republican judges appointed by Trump in the federal courts. For months, we have been hearing arguments that one or more Republican state legislatures in states where Biden has won the popular vote could simply cancel the results of the election if protracted litigation left the final results unsettled. One excuse they would offer for substituting their own electors is that they need matters settled by the safe harbor date of 8 October.

All Trump has to do to win, then, is to drag out final certification of the results in key states for five or six weeks in order to make it hard to certify the results in time. And then the state legislatures in which Republicans dominate can use this as an excuse to directly choose a slate of electors who will vote for Trump even if the electorate said otherwise.

There's another possible nightmare scenario involving the Electoral College. If the election challenges proceed until after the safe harbor date, Trump has another path to victory. If continuing litigation means that some states are not represented at all because they couldn't certify their election results in time or if some states are represented by electors whose validity can be challenged because they were picked after the safe harbor date or if there is a tie, then the Constitution throws the choice of president to the House of Representatives.

Democrats have a majority in the House of Representatives, even after losing some seats in Tuesday's election. So this doesn't look like a winning strategy for Trump. But the US Constitution announces a special voting rule for the House when it votes directly for president: Each state's congressional delegation gets only one vote.

Even though there is a Democratic majority overall in the House, fully 26 states had a Republican majority in current their House delegations going into Tuesday's election. With Democrats projected to lose more than a half dozen seats in the new House, Republicans may even gain more states in which their House delegations have a majority of Republican representatives. Either way, an election for president thrown in January to the House of Representatives by a confused Electoral College vote would almost surely result in a win for Trump.

So, Trump's endless parade of litigation may not actually need to win on the merits.

It may seek to avoid certifying results in time for the Electoral College vote to run smoothly given the tight timeline. In the past, courts hearing election challenges have been sensitive to the deadlines and have speeded up their judgments. But given that these cases are being brought by Trump's lawyers in the federal courts where [Trump has already appointed](#) nearly one third of the bench and given that many of Trump's judges [have already ruled in his favor](#) in contested election cases, litigation this year may take unpredictable paths.

So the American electorate seems to have spoken and it seems to have rejected President Trump. But there is still the possibility of mischief if Trump succeeds in using the law to thwart the election results. The US constitutional system with its strange and unique system for selecting a president is just rickety enough to make it possible for Trump to litigate his way out of an election loss. Only litigation-proof majorities in the key remaining states will provide a guarantee that the election process will produce a definitive result any time soon.

